Supreme Court, U.S.
FILED
JUL 10 1980
MICHAEL RODAK, JR., CLERK

No. 80-45

Supreme Court of the United States

October Term 1979

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

Edward L. Genn
1319 - 18th Street, N.W.
Washington, D.C. 20036
Counsel for Petitioner

QUESTIONS PRESENTED

1. May a statute constitutionally authorize an adoption over the objection of a natural parent on the ground that the parent's non-consent is found to be "contrary to the best interests of the child", whether the statute is viewed facially or as applied to a divorced parent granted visitation rights, where there is no parental abandonment, abuse or unfitness.

2. Whether divorced parents who have visitation but not custody rights *per se*, may be properly treated by lesser constitutional standards and reasons than those who are not divorced, such that the establishing of greater security in the stepparent unit or the avoidance of conflicts arising from visitation orders, would be constitutionally sufficient reasons for the state

to grant the permanent severance of the relationship between the natural parent and his children through its adoption statutes.

3. Whether the lack of any specific substantive, procedural and evidentiary standards for the interpretation of an adoption statute that allows the permanent severance of the parent-child relationship solely on a basis of what is stated to be the "best interests" of the children, is constitutionally permissible as a matter of notice and substantive right.

LISTING OF PARTIES

The petitioner is the natural parent, Eugene Johnson III. This is an adoption proceeding. As a result of the decision there are certain restrictions on names. Separately filed are the names of the respondent stepparent, here called J.O.L. II, and the former wife, each of whom was a party below.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Parties to the Proceeding...	ii
Table of Contents and Table of Authorities.....	iii
Petition for a Writ of Certiorari	1
Reference to Findings, Opinions and Decisions Below.....	2
Grounds on which Jurisdiction is Invoked.....	3
Constitutional and Statutory Provisions Invoked.....	4
Statement of the Case.....	6
Reasons Relied on for Allowance of Writ.....	16
Conclusion.....	28
Appendix	
Findings/Opinion of Trial Court.....	App. 1-13
Opinion and Judgment of District of Columbia Court of Appeals	App. 14-20
Order of March 27, 1980 Denying Petition for Rehearing En Banc	App. 21
Constitution of the United States Amendments I, V, IX, XIV..	App. 22
District of Columbia Code 16-304 (a) through (f).....	App. 23-24

TABLE OF AUTHORITIES

	Page
Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10 (S.D. Iowa 1975) affd. in part, 545 F.2d 1137 (8th Cir. 1976).....	25
Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760 (1979).....	19, 20, 23
Davis v. Smith, ___ Ark. ___, 583 S.W.2d 37 (1979).....	22, 25
Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678 (1965).....	23
In the Matter of Petition for Adoption of J.S.R., D.C.App., 374 A.2d 860 (1975).....	15, 21, 22, 24
In re William L., 477 Pa. 322, 383 A.2d 1228 (1978).....	25, 26
John Doe and Jane Roe v. Delaware, 407 A.2d 198 (Del. 1979), prob. juris. noted, 48 U.S.L.W. 3616 (Mar. 25, 1980).....	26
Key v. Doyle, 434 U.S. 59, 98 S.Ct. 280 (1977).....	3
Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923).....	23
Palmore v. U.S., 411 U.S. 389, 93 S.Ct. 1670 (1973).....	3
Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493 (1979).....	19

Petition of J.O.L., II, D.C.App., 409 A.2d 1073 (1979)..... 2

Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438 (1944)..... 23

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549 (1978)..... 18, 20

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705 (1973)..... 23

Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S.Ct. 2094 (1977) 18, 20

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972)..... 18, 23

Ward v. Faw, ___ Va. ___, 253 S.E.2d 658 (1979)..... 22

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment I.... 4

U.S. Constitution, Amendment V.... 4

U.S. Constitution, Amendment IX... 4

U.S. Constitution, Amendment XIV.. 4

STATUTES

District of Columbia Code, 1973 Edition, Sections 16-304 (a)-(f).. 4, 6, 7

TREATISES

Note, Developments in the Law - The Constitution and the Family, 93 Harv.L.Rev. 1156 (1980)..... 27

Note, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, Vol. 1980 Duke L.J. No. 2, 336 (1980)..... 28

Comment, Malpass v. Morgan: Determining when a Parent's Consent to an Adoption is Withheld Contrary to the Best Interests of the Child, 60 Va.L.Rev. 718 (1974)..... 22

World Almanac and Book of Facts 1980, Newspaper Enterprise Association, Gosset and Dunlap Edition, 1980.. 16

Goldstein, Freud, Solnit, Beyond the Best Interests of the Child, The Free Press, New York, New York, 1979..... 24

No._____

Supreme Court of the United States
October Term 1979

Eugene Johnson III, Petitioner

v.

J.O.L. II, Respondent

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner Eugene Johnson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered on December 10, 1979 on the grounds and bases hereafter appearing.

OPINIONS BELOW

The unreported Opinion and Findings of the Trial Court appears in the Appendix to this Petition (App. 1-13).

The decision of the District of Columbia Court of Appeals, styled as "In the Matter of Petition of J.O.L. II for Adoption of Minor Children. Appeal of Eugene Johnson III" is officially reported as "Petition of J.O.L., D.C.App. 409 A.2d 1073 (1979)." The slip opinion of that Court appears in the Appendix to this Petition (App. 14-20). The official report references also appear therein.

The Order and Judgment of the Court dated March 27, 1980 denying the Petition for Rehearing En Banc appears in the Appendix at App. 21.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on December 10, 1979.

A timely petition for rehearing en banc was denied by a majority of that Court (two judges stating they would vote to grant the petition) on March 27, 1980.

A motion for extension of time to file this petition to and including July 10, 1980 was granted on June 17, 1980 by order of the Chief Justice, No. A-1100.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3) in the light of this Court's rulings in Palmore v. United States, 411 U.S. 389, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973) and Key v. Doyle, 434 U.S. 59, 98 S.Ct. 280, 54 L.Ed.2d 238 (1977).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the First, Fifth, and Ninth Amendments and to the extent analogous, the Fourteenth Amendment of the Constitution of the United States, all set forth in the Appendix to this Petition (App. 22).

The critical statutory provisions are set forth in D.C. Code 1973, Title 16 § 304(a) through (f). The entire Code provision is set forth in the Appendix (App. 23-24).

Particular attention, however, is called to Title 16-304(d) and 304(e). Title 16-304 of the D.C. Code provides in part (a) what is required; in part (b) when consents are necessary; and for pertinent portions here, namely subsections 304(d) and 304(e) which authorize an adoption where consents are not obtained in certain

circumstances. They read as follows:

304(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

304(e) The court may grant a petition for adoption without any of the consents specified in this section when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

STATEMENT OF THE CASE

This action began with a Petition for Adoption of the two natural children of this petitioner, Eugene Johnson, by a step-father who married the natural mother upon her divorce from the natural father. He is named in the current proceedings as "J.O.L. II." For ease of reference, first names will be employed here. The step-father is John (J.O.L. II). The natural mother is Deborah (D.W.L.). The two children are Judith and Elliott. The natural father who was the appellant below and is the petitioner here is Eugene (E.J. III).

The Petition by stepfather John for the adoption of Judith and Elliott was filed on March 31, 1977, and rested its grounds on 16 D.C. Code, 1973 Edition, Sec. 304(d) based on an alleged abandonment

and Sec. 304(e) based on an alleged "best interests" standard. Eugene objected and answered at length (R. 6-14).

The critical ultimate and actual "historical" findings are of course in the Trial Court's opinion (App. 1-13).

The evidence and findings by the Trial Court in this case show that Eugene has had his children adopted from him, primarily because he exercised visitation rights which the Court had awarded in 1971 and 1972. Those rights involved his natural daughter, Judith, born in October 1964 and his natural son, Elliott, born in January 1966 (R. 196, App. 2).** The

---

** Elliott is really Eugene Elliott, after his natural father, as the Petition shows (R. 1). The Trial Court, evidently relying on the erroneous testimony of the mother that he was born in 1967 rather than 1966, so found (W.Tr. 5, mother's testimony; R. 196, birth finding).

divorce of Deborah and Eugene, obtained by her in the Virgin Islands, was in 1968 (R. 196; App. 2; W.Tr. 13).

The found facts indisputably reflect that the children involved in this proceeding refused to go on visitations, resisted visitations; and stated that they did not care about their natural father, did not want to see him, would not see him, and in general, whether derived from either the natural mother or stepfather or their own misperceptions, so acted as to create the very conditions which resulted in the ultimate decree (App. 3-5; 8; 12-13).

The only found basis of this "adoption," in short, rests upon what the Trial Court's Memorandum Opinion conceded was at the heart of the problem: "the considerable resistence" to Eugene's exercise of his natural visitation rights (App. 4; R. 199); the fact that the children

"would create a ruckus" and "refuse to accompany him anywhere" (App. 4; R. 197), the "times" he was "insulted" (App. 4; R. 197) and, in the end, how the Court accepted that fact as likely to continue, and so decided to resolve that condition by severing the relationship permanently based on a "best interests" standard (App. 12-13; R. 205-207).

The Court stated that it was "in sympathy with the "pain" that permanent severing would cause Eugene (App. 11; R. 205). It acknowledged and conceded that Eugene's visits "from the time of his divorce until the last visit in 1972 (were) <u>often against the desire of (the children's) mother and petitioner (John)</u>" (App. 7; R. 201, emphasis added). Its findings acknowledged and conceded that to exercise his rights, Eugene "continually sought legal recourse" (App. 11; R. 201) and although he received

the legal right, it was in fact what went on when it was exercised (the ruckus, the resistence, the insults) that induced him to cease pressing for the right; and, as the Court acknowledged and found, "at the expense of much personal pain, (Eugene) decided to discontinue his visits with the hope that when the children were older, they would recognize the affection he felt for them and understand that he was a legitimate part of their lives" (App. 4; R. 198).

The Court not only found these facts, it found more. It even found that it was Eugene's very "continued interest in his children which precipitated the (adoption) action" itself (App. 7; R. 201). It, of course, found no abandonment at all even though visitation stopped after the last ruckus in 1972 (App. 7; R. 201). It found that throughout the natural father's

actions --- even in stopping his visitations with his children because of the "adverse emotional effect" they had (App. 11, R. 205) and the "emotional disturbance" those visitations caused (App. 12; R. 206) --- were all "motivated by parental love and concern rather than dereliction of duty" (App. 8; R. 203). It is to these ultimate and found "historical" facts that the "constitutional" facts, standards and principles must apply. The Court of Appeals used a term never found in fact below --- that these visitations caused "extreme emotional stress". That fact aside, it is clear from even its extensions of the findings that there was no claim that the children were in actual therapy or in need of it, that they were being treated or that the decision below was justified on grounds other than quoted by the appellate court at the conclusion of its Opinion from the decision below (App. 20).

The cause and reason for the cessation of visits is undisputed. After Eugene's hospitalization in 1967 and during the period awaiting divorce and thereafter, Deborah insisted there be no visitations unless a third person be present. That third person was the stepfather who married Deborah. All parties agreed that Eugene objected to that demand and therefore saved some money to go to court for another order. The need of the father to go to court to obtain a court order; his agreement pending final hearing to a third party's presence if it were not the stepfather; and the final order where no third person was to be present were the background circumstances that led, finally, to his ceasing of his visits until the ruckuses would stop and the children were of age to accept him.

There was considerable evidence of different life-styles (W.Tr. 40, T.Tr. 22).

While the Court of Appeals decision noted that there were some problems with the father, the Trial Court never found that the children were affected by that fact.

For the sake of argument, however, we exclude that factor. Accepting all of the extensions of the findings, the issue was not the legal sufficiency for the Court to find adverse emotional effects from the visitations but the constitutional sufficiency of those facts.

There was no doubt, as in many visitation cases, that there was stress; and no doubt the children stated that they preferred the stepparent unit. They each recognized, however, as the son said, if adoption were not granted and "if we lost, it wouldn't change my life" (F.Tr. 247-248); that "the big advantage of the adoption would be to keep Gene (the father) from coming around" and "sort of declare (us)

legally (a family)" (F.Tr. 248). As the daughter said, it would mean that they would not be "hassled" as she was on her birthday "which made me upset...I got some roses that said 'from your loving father or 'dad' or something like that. And we wouldn't have to bother with any of those. And no phone calls or visits or anything like that...it was sort of bothersome. ....It just made me upset" (F.Tr. 236, 238).

The psychiatrist found only the potential for serious stress if visitation resumed, acknowledged that the children did not need treatment and viewed the visitations as "impositions" of them that induced him to recommend an adoption (W.Tr. 92-3;108).

The idea of a lesser alternative such as counselling or something short of permanent severance was ignored or rejected at all levels --- psychiatrically and in the Opinions below in the Court of Appeals and the Trial Court.

One observes that the tenor of the findings recognized the differences in life styles between the natural parents (the father was not only forced to pick up the children at the servant's entrance, T.Tr. 102-3, but proceeded because as the Trial Court noted, he felt his children were in a "sheltered cocoon." App. 12, 20).

Finally as to the issues raised. In the Opinion at the Trial level, in the decision in the Court of Appeals and in our en banc petition, the Courts below had addressed to them all the issues appearing in this Petition as they themselves show.

The confusion of custody and adoption standards; perpetuating In the Matter of the Petition for Adoption of J.S.R., D.C. App., 374 A.2d 860 (1975); extending it; the procedural, notice and substantive issues that raised were pursued in our Briefs and Petitions, as the Opinions indicate. These issues as reasons to grant the writ are briefly addressed.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Ruling Below Has Decided an Important Question of Federal Law Affecting a Large Number of Divorced Citizens Which Has Not But Should Be Settled by This Court; and Which Appears In Conflict With Dicta From This Court.

Recent statistics support the commonplace statement that for every three or less marriages, there will be one divorce obtained. In 1970 there were roughly 2,158,000 reported marriages, 708,000 divorces; by 1977, with a much larger population, marriages increased only 20,000 while divorces exceeded 1,090,000 with the trend thereafter continuing in that proportion. See the World Almanac and Book of Facts 1980, by Newspaper Enterprise Association, Grosset & Dunlop Edition, pp. 951-952, 964.

Of that yearly number, a significant percentage affect not only the parents but the children of those divorces.

This Petition is about the intrusion of the "State" --- here the District of

Columbia --- into the relation of a divorced natural parent with his natural children, and its authorization through its adoption statutes of the permanent severing of that relation where there was no abandonment, abuse or unfitness on his part and no compelling necessity to grant the draconian relief of adoption for the alleged avoidance of stress over visitations and contacts with a natural father.

The scope, breadth and important issues of federal law decided seem fairly self-evident.

No less evident is that fact that while in other contexts decisions of this Court have addressed procedural and substantive issues that are related to the specific questions on this Petition, none has directly dealt with the important procedural and substantive rights of divorced parents.

Certainly dicta, assumptions or reservations in the past decade of cases in this area have implied that: (a) a "best interests" standard in a state or parental termination statute cannot be constitutionally used to cause the "breakup of a natural family." See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 862-863 (1977)(Stewart, J., concurring in judgment), cited with approval in Quilloin v. Walcott, 434 U.S. 246, 255 (1978); (b) Smith itself clearly appears to recognize the importance of the "biological" relation and, while not excluding foster parents as "family" also seems to indicate that the "controversial" "psychological parent" theory is not per se a sufficient constitutional basis for eliminating the fundamental parent-child relationship summarized in Stanley v. Illinois, 405 U.S. 645 (1972). See Smith, 431 U.S. at 843-847 and ftn. 52; (c) recently in

Parham v. J.R., 442 U.S. 584 (1979) this Court emphasized in a different context where state intrusion appears more limited, justified, or does not involve permanent severance, then, natural parents and not the state retain the substantial if not dominant role with regard to children, absent a finding of neglect or abuse; that a child is not a creature of the state; and that statist notions allowing governmental power to intrude in these relations absent the most compelling reasons of essential need is repugnant to our traditions;* or as noted in Stanley, 405 U.S. at 650, absent a powerful countervailing interest, the natural parent-natural child relation undeniably "warrants deference (and) protection"; (d) in Caban v. Mohammed, 441 U.S. 380 (1979), this Court's Opinion expressly left open the question whether adoption is permissible absent a showing of unfitness.

---

* Parham, 442 U.S. at 602-603.

Caban, 441 U.S. at 394, footnote 16. In that same decision, which incidentally followed Quilloin's adoption of the concurring statement in Smith, Justice Stewart appears to read that concurrence as one assuming "that each married parent after divorce has some substantive due process right to maintain his or her parental relation...." 441 U.S. at 397.

Undoubtedly some language in Quilloin may be read to imply a distinction in substantive and procedural protections between divorced parents and an existing family unit. On the other hand, Quilloin's emphasis on the fact that the father there, unlike the divorced parent, had never been a de facto member of the child's family unit suggests that if there is a distinction in when the state may intrude, it will require a good deal more of specificity in the statutory standards of "best interests" and

a great deal more than the most expansive reading of this record --- adverse emotional effects over visitation and greater security in the stepparent unit --- to overcome the constitutional rights at issue.

In this regard we noted in our original brief, reply brief and petition for rehearing en banc the erosion of the premises of the case which upheld the constitutionality of the District of Columbia statute at issue, In the Matter of Petition for Adoption of J.S.R., D.C.App., 374 A.2d 860 (1977).

Of course the panel hearing the cause was bound by that ruling; hence we suggested an en banc determination (Main Brief Statement of Issue 5, 9, pp. 3-4, 46-7; Reply Brief, p. 13; Petition for Rehearing En Banc, p. 5-7, 9-10).

The facial invalidity of the statute was and continues to be at issue by our attack on J.S.R., supra.

As we noted below, J.S.R. conflicts with the foregoing principles, and rulings in Virginia under a like statute. See Ward v. Faw, ___ Va. ___, 253 S.E.2d 658 (1979). See Malpass v. Morgan: Determining When a Parent's Consent to an Adoption is Withheld Contrary to the Best Interests of the Child, 60 Va.L.Rev. 718 (1974). We also noted that it conflicts with the principles of Davis v. Smith, ___ Ark. ___, 583 S.W.2d 37 (1979).

Equally important, we noted this:*

> The Premises of JSR, Relied on by the Panel, are so Faulty that it Either Should be Strictly Limited or so Clarified, Preferably By the Court En Banc, as not to Apply to the Constitututional Issues at Bar
>
> JSR --- the Opinion's answer to all our Constitutional issues, substantive and procedural --- relies on Winter v. Director, Department of Welfare, 217 Md. 391, 143 A.2d 81 (1958). (JSR, 374 A.2d at 863, end of Part I on procedural standard; JSR, 374 A.2d at 863-864, Part II for substantive right.)
>
> Winter, now 21 years old, was written long before Griswold, Roe, Stanley or any of the recent Supreme Court cases and did not even refer

*Petition for Rehearing, pp. 9-10.

to Prince and Meyer.[6] It specifically held that while the "natural" rights of the parent (rather than constitututional rights) must be "carefully guarded" (143 A.2d at 84), it also rested its entire ruling --- quoted in JSR --- on the fact that "(The) validity of (this) legislation permitting an adoption without the parents' consent is based on the fact that a parent has no inherent right..." That is not the law. That is most certainly not the current law; and JSR's resurrection of it is faulty in the extreme. Even JSR's opening reference to Stanley v. Illinois, so denied in principle by its quotations from Winter only a paragraph later, is inadequate to the constitututional right and issue involved --- the extent of the State's power to intrude where there is no compelling issue of safety, no physical needs to be met, no clear danger to health and no abuse or abandonment. The issue is not "natural" rights as Winter states but

---

[6] Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965); Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944); Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 627 (1923); Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760 (1979).

> constitutional rights and how they are to be weighed. Interestingly in the Opinion at bar, p. 6, in citing the six factors to be considered by the Court and in fact considered below, the parent's constitutional right is absent.

We find that latter point rather significant, to say the least --- that when the Court of Appeals applied its standards to determining "best interests" the parent's constitutional right is wholly absent (App. 19, 409 A.2d at 1075).

JSR is a confusion of principles, including custody and adoption tests.

It rests on a psychological parent theory that arises from a book which specifically states that from its perspective a "non-custodial parent should have no legal enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." Goldstein, Freud and Solnit, Beyond the Best Interests of the Child, 1979 Ed., p. 38.

Finally we suggest as below that the lack of notice in this statute renders it constitutionally defective for the very reasons noted in Davis supra and other referenced cases below such as Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10 (S.D. Iowa) affd. in part 545 F.2d 1137 (8 Cir 1956). See also In re William L., 447 Pa. 322, 383 A.2d 1228 (1978) which we noted had the kind of specificity in its termination statute, or was so construed, that is totally lacking here.

We read this current law to mean that (a) absent unfitness, abuse or abandonment, these rights cannot generally be severed permanently, even where there is divorce; that, alternatively, only if adoption is the sole alternative and something lesser will not satisfy to avoid imminent actual harm to a child may the adoption of a natural child be warranted absent

such conditions; and that specific conditions must appear in the statute or court decision to give notice of what specific events could serve as a basis for such final and total severance of the relationship. Using a custody or psychiatric standard is not permitted by constitutional demands, as a matter of substance, notice, or procedure. This Court should grant and allow the writ to hear these important undecided issues.

2. The Ruling Below Has Decided The Federal Question in a Way That Conflicts with the Decision of Another State Court and Involves Issues Related to a Cause Now Pending Before it.

For reasons already noted, it seems clear that this opinion conflicts with Faw supra, and the rationale of William L. and Davis supra. That fact warrants review.

This Court has recently noted probable jurisdiction in John Doe and Jane Roe v. Delaware, No. 79-5932, known below as

Matter of Five Minor Children, Del., 407 A.2d 198 (1979) in circumstances perhaps less compelling and with at least as much statutory specificity. We suggest that issues here directly relate to that action.

That our appeal is discretionary under Key or Palmore, supra, should not make a difference.

Recent reviews of family law tend to support our contentions about the importance of these subjects. The unsettled situation, the open questions, and the general direction that would favor the position urged in recognizing, among other things, that even in custody cases, divorced parents' rights should not be deemed substantially less, per se, because the unit is not housed in the same place; that visitations almost always create stress; and that the direction of this Court's decisions is properly to limit state intrusions to unfitness, abuse, or where because

of actual or imminent harm it is compellingly necessary and no less intrusive alternative is available; and then only under clear notice statutes. See Note, Developments in the Law - The Constitution and the Family, 93 Harv.L.Rev. 1156, 1319-20, 1322, 1326-29 (1980). Cf. Note, Application of the Vagueness Doctrine to Statutes Terminating Parental Rights, Vol. 1980 Duke L.J., No. 2, 336 (1980).

CONCLUSION

This Petition should be granted.

Edward L. Genn
Attorney for Petitioner
1319 - 18th Street, N.W.
Washington, D.C. 20036

INDEX TO APPENDIX

Page

Opinion of Trial Court (Judge Paul Webber), Superior Court of the District of Columbia..... App. 1-13

Opinion and Judgment of District of Columbia Court of Appeals. App. 14-20

Order of March 27, 1980 Denying Petition for Rehearing En Banc App. 21

Constitution of the United States Amendments I, V, IX, XIV..... App. 22

District of Columbia Code 16-304 (a) through (f)..... App. 23-24

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

FAMILY DIVISION

EX PARTE IN THE MATTER OF the Petition of John O. LaGorce, II for the Adoption of Minor Children	)))))	Adoption No. A92-77

MEMORANDUM OPINION AND ORDER

Petitioner, J.O.L. filed the petition herein for the adoption of his wife's two minor children by a previous marriage. Respondent, the natural father of the minors, withheld his consent to the proposed adoption effectively halting any furtherance of petitioner's cause.[1/] Petitioner sought relief from the court pursuant to 16 D.C. Code

****

1/ 16 D. C. Code 1973

§304 (a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgements, before a representative of a licensed child-placing agency, or before the Commissioner of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786.

1973 §304(d) and (e),2/ and at the hearing on this matter, requested a finding in accordance with said provisions, that the respondent had abandoned his children and therefore his consent was not required, or in the alternative that respondent's consent was being withheld contrary to the best interests of the minors and therefore the petition should be granted. (R. 196)

I

Respondent and the children's mother were married to each other on May 5, 1961. The couple had two children, J.H.J. born on October 28, 1964 and E.E.J. born on January 27, 1967. In August 1967 the parents separated and on June 28, 1968 they were divorced. Custody of both children was awarded to the mother, and respondent by agreement was ordered to pay $75.00 per month towards the support of each child.

On April 25, 1969 the mother and petitioner were married and over the last nine years they have lived together with both children and the couple's first child, born on October 16, 1972, as members of a nuclear family. Petitioner, a

****

2/ §304(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section, when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

41 year old volunteer schoolteacher, has established himself as the surrogate father of the two children involved. The record is replete with acts which manifest the sincerety of his affection for them, and his attention to the emotional needs and development of these youngsters has been salutary. It is clear that respondent is a good father to these children and that they in turn identify with him as their psychological father. Petitioner and his wife are financially secure and there is no issue regarding their ability, independently or collectively, to provide for the material needs of the children.

(R. 197)

Respondent is a 39 year old experimental psychologist. After his divorce in 1968 he visited his children regularly until August, 1969 when he was hospitalized for a mental illness at the George Washington Psychiatric Clinic. After a brief stay of approximately twelve days he was released and in September, 1969 began visiting the children again. Despite his denials, the children's mother believed that respondent was a chronic schizophrenic and she insisted that petitioner be present during the visits with the children. Respondent did not favor this condition but abided by it until February, 1970 when his twice monthly visits ceased. There were no more visits until July, 1971. During this period respondent initiated five telephone calls in an effort to contact the children, but the parties could reach no agreement regarding the conditions for a visit and consequently none occurred.

After his last telephone call on November 1, 1970 respondent had no further contact with petitioner's family until eight months later in July, 1971 when he brought an action in the Family Division of the Superior Court in case number D 2065-71 to obtain less restricted visitation privileges with his children. In that month an order pendente lite was issued in said case granting

respondent twice weekly visitation privileges in the presence of a third party other than petitioner. On July 20, 1972 a final order was entered pursuant to a settlement agreement, according respondent liberal visitation privileges without the presence of any third party. After this respondent visited with the children three more times, the last occasion being in October, 1972.

On the visits following the pendente lite order respondent encountered considerable resistance from the children. They would create a ruckus and refuse to accompany him anywhere. At times he was insulted, and he was also accused of wishing to break up their family.

(R. 198)

The children complained that respondent badgered them regarding their lack of affection for him and made derogatory remarks about their mother. By his own admission respondent recognized that he was placing his children in a position of great emotional conflict, and at the expense of much personal pain, decided to discontinue his visits with the hope that when the children were older they would recognize the affection he felt for them and understand that he was a legitimate part of their lives. Respondent terminated his support payments in February 1973 because of his belief that they were unnecessary to provide for the needs of the children. The children's mother has expressed no desire to secure the resumption of those payments.

This action, filed in March 1977, was precipitated by a telephone call that respondent made to the children's mother requesting a photograph of them. Because there had been no communication from him since October, 1972 the mother felt it would be wrong to honor the request without professional advice. She consulted a child psychiatrist who recommended that no photograph be sent and that petitioner consult with legal counsel.

Subsequently, this petition to adopt the minor children and thereby terminate respondent's rights as their natural father was filed. (R. 199)

II

The petition alleges that respondent's consent is not required because he has abandoned his minor children.3/ In accordance with the statutory scheme it is the court's duty to determine whether such an abandonment has occurred.

The termination by law of the rights of a natural parent to his children on the grounds of abandonment is one of the most severe steps that a court may take. "The finality of the termination and the harsh connotations of a finding of 'abandonment' carry great emotional impact on both the child and the parent". In re Adoption of Sarver, 281 A.2d 890, 891 (Pa 1971). Accordingly, the court will be unwilling to make such a finding unless the record clearly warrants it.

The District of Columbia Code is silent as to the criteria to determine abandonment in a civil proceeding and, likewise, no appellate decision of this jurisdiction establishing such has been presented to the court.4/ The overwhelming majority

****

3/ Id § 304 (d)

4/ In the abandonment cases presented from this jurisdiction, the factual determination of abandonment had been settled below and the issue of what constituted abandonment was not before the appellate court. See In the Matter of C.A.P., 356 A.2d 335 (D.C.C.A. 1976). Petition of J.E.G. and M.K.G., 357 A.2d 855 (D.C.C.A. 1976). White v In the Matter of N.E.M., 358 A.2d 329 (D.C.C.A. 1976)

of jurisdictions, however, are of the view that an abandonment within the purview of the adoption law must be absolute, complete and intentional.5/ (R.200) Abandonment by a parent therefore, means the neglect and refusal to perform the natural and legal obligations of care and support or conduct which evinces a settled purpose to forego all parental duties and all parental claims to the children. In re Adoption of Sarver, supra., In re Farquharson, 102 N.Y.S. 2d 230 (1950); Stalder v. Stone, 412 Ill. 488, 107 N.E.2d 696 (Ill. 1952); Shumway v. Farley, 68 Ariz. 159, 203 P.2d 507 (Ariz. 1949).

Certain specific acts of conduct may be distilled from the general case law as evidence of abandonment. Where the necessary criteria have not been established by statute, courts faced with this issue have focused in varying degrees, on whether the children were left permanently or identifinitely (sic) in the care of others;6/ whether the parent has deserted the children;7/ the voluntariness of the separation;8/ the period of time without any contact and the reasons therefor;9/ and the failure of the parent to provide for the support of the children.10/

****

5/ Annot., 35 A.L.R. 2d 622, 664 (1954)

6/ In re Ewing, 96 Ida. 424, 529 P.2d 1296 (1974); Finn v. Rees, 65 Ida. 181, 141 P.2d 976 (1943)

7/ Shumway v. Farley, supra; In re Mayfield, 158 Or. 409, 76 P.2d 984 (1938); In re Davis, 142 Misc. 681, 255 N.Y.S. 416 (1932)

8/ In re Walpole's Adoption, 5 Ill. App. 2d 362, 125 N.E. 2d 645 (1955)

9/ In re Lieblich's Adoption, 207 Misc. 793, 141 N.Y.S. 2d 473 (1955)

10/ Annot., 35 A.L.R. 2d supra. 683 (1954).

(R. 201)

As a divorced parent without custody, respondent had limited contact with his children and fairness demands that he be judged accordingly. Respondent made several visits with his children from the time of his divorce until the last visit in 1972, often against the desire of their mother and petitioner, and continually sought legal recourse whenever that right was threatened. Though he prevailed in his efforts to secure that right he eventually ceased to exercise it when he perceived the potential for harm to these children. Despite the fact that five years passed between his last visit and the filing of the petition for adoption, respondent's motives militate against a finding of abandonment. Ironically, it was his continued interest in his children which precipitated this action that may terminate his parental rights. Petitioner admitted that the request for photographs was viewed as a signal that respondent intended to re-enter the children's lives and both he and his wife feared the psychological effect this might have had on them.

Based on these facts the court finds that respondent lacked the requisite intent for a finding of abandonment. In a similar case in Pennsylvania, the natural mother had not contacted her child in six years. She had refrained from doing so at the request of the child's guardian who was concerned that the child was becoming confused that she should have two mothers. The mother stated that she complied with the request because she did not wish to upset her own child. The Supreme Court of Pennsylvania in reviewing the case found that these motives were inconsistent with a finding that the mother intended to abandon the child. In re Adoption of Sarver supra. While that decision is not binding in this jurisdiction, the court finds the factual evaluation therein as being persuasive in the case at bar.

(R. 202)

The petition also raises the issue of respondent's failure to provide any support over the last five years. While the court does not sanction such conduct, under the circumstances of this case and the prevailing state of the law, it does not find petitioner's argument persuasive. Only a few courts have taken the position that this criterion alone is sufficient to establish abandonment and then such failure to support has been held as not even tending to establish an abandonment where such conduct is excused by the circumstances.11/ Our own statute imposes a burden on the court to find that respondent "abandoned the prospective adoptee and voluntarily failed to contribute to his support..."12/ Giving the statute its plain meaning, the legislative intent appears to be that the court must first reach a conclusion as to the question of abandonment and then couple it, where present, with respondent's failure to support. This ensures that lack of support be present before termination of parental rights on a finding of abandonment, but excludes it as a factor to be given great weight on the central issue of abandonment.13/

(R. 203)

When measured against this standard respondent's action appears to have been motivated by parental love and concern rather than dereliction

****

11/ Id 680; 2 C.J.S. Adoption of Persons § 61(b) (1972)

12/ See n. 2

13/ In resolving this issue, the court takes into consideration the fact that the children's mother, a person of substantial financial resources, acquiesced in respondent's non-support. See Smith v. Crivello, 338 Ill.App. 503, 88 N.E.2d 107 (1949).

of duty. For these reasons the court cannot find that respondent's conduct evinces a settled intent to forego all parental duties and claims to his children sufficient to constitute an abandonment.

III

The petition also alleges that it is in the best interests of the minor children that they be adopted; that respondent's consent is withheld contrary to said interests; and that pursuant to 16 D.C. Code 1973 § 304(e) the court should grant the petition for adoption over respondent's objection.

It is the primary function of the court in these matters, to determine the best interests of the children and whether respondent is withholding his consent contrary to those interests. In re Petition for Adoption, 313 A.2d 874 (D.C.C.A. 1974). In re Adoption of a Minor, 97 U.S.App.D.C. 99, 228 F.2d 446 (1955). Petitioner has provided uncontroverted evidence of the emotional stability and physical well-being of the children in their present home. Petitioner's psychiatrist testified that the children accept petitioner as their psychological father and the court is urged to recognize in law what is already a fact. The recommendation of the social service department also cites this fact as the basis for its conclusion that the petition should be granted.

There is no question that the home petitioner provides for the children is the appropriate environment in which they should be reared. Unlike

the cases cited to the court[14/] the outcome of this action has no bearing on that fact. Custody of the children rests with the mother and the family unit will remain intact as long as petitioner and his wife wish.

(R. 204)

After the issue of custody is taken from consideration the effect of an adoption on the children's welfare would be manifest in the following ways. It would legitimatize the status of the children in their home and terminate respondent's legal right to have access to them.

The former has been recognized as a valid concern which must be weighed in petitioner's favor as being in the best interest of the children. This is especially true, whereas here, the evidence indicates that the children consider petitioner their father, often using his surname as their own. This issue was addressed in a situation where a petition for adoption was denied as not being in the child's best interest because the petitioner was of a different race. The court held that:

> The child is living in the happy home of its natural mother and stepfather, receiving the same loving care they give to the two children born of their marriage. That it is in the best interests of the child to live in that home with the natural mother is obvious.

****

14/ In re J.H., 313 A.2d 874 (D.C.C.A. 1974); In re Adoption of a Minor, 79 U.S.App.D.C. 191, 144 F.2d 644 (1944); In re Adoption of a Female Infant, 237 A.2d 468 (D.C.C.A. 1968); Petition of J.E.G. and M.K.G., 357 A.2d 855 (D.C.C.A. 1976)

> It is equally plain that the child will continue to live there no matter what disposition is made of the case. Hence denial of adoption could only serve the harsh and injust end of depriving the child of a legitimatized status in that home.

In re Adoption of a Minor, 97 U.S.App.D.C. 99, 101 (1955). Furthermore, it has been held in this jurisdiction that the right of parenthood is greater than having mere custody.15/ Petitioner will bear all the burdens of being a father to these children as they grow up and it will be to their benefit to provide him with the full legal authority to be able to act accordingly.

(R. 205)

An adoption also results in a corresponding name change. While this fact alone is not of overriding importance, in view of the children's past behavior regarding this factor, there is no doubt that it will promote the sense of security they would enjoy within the established family unit.

The other effect of an adoption would be to terminate respondent's legal right to visit with his children. The court is in sympathy with respondent because the pain this would cause is understood. However, the record is clear that his visits have an adverse emotional effect on the children. Respondent not only admits this fact but stresses it as his reason for refraining from visiting them for the past five years. When discussing this resentment that his children feel

****

15/ In re J.H., 313 A.2d 874, 875 (D.C.C.A. 1974)

towards him respondent acknowledges that "the probability is that they will not change". Nevertheless, respondent urges that the petition should be denied to prevent the father from anymore hurt than he has already endured. Unfortunately, the power of the court's writs falls short of the control of human emotions. Ever mindful of the pain it may cause, the ruling of this court must be according to law. The adoption proceeding is a creature of statutes and is a right that was unknown at common law. In re Jarboe's Estate, 235 F.Supp. 505 (D.C.D.C. 1964). As such, those statutes evince the will of the legislature and pursuant thereto it is the best interest of the children that must receive the overriding concern of the court. While respondent's interests as their natural father must not be unreasonably discarded, they must sit lighter in the scales of justice.16/

(R. 206)

These matters inherently involve predicting the future to some degree, but the court has not been imbued with the powers of a clairvoyant. The risk of error therefore accompanies any decision that it may render, However, if there is error the overwhelming conclusion based on the statutory scheme must be that the court should err in favor of the best interests of the children.

Respondent for five years failed to exercise his right to visit. A failure he states was based on his own concern because he recognized the emotional disturbance that his visits created. Nevertheless, he argues that he should be allowed to retain this right, in light of all the other benefits it would deny the children, so he may force the children from the "sheltered cocoon" in which

****

16/ 2 C.J.S. Adoption of Persons § 93 (1972)

they exist and into the real world to acknowledge him as their father. There is merit in the contention that these children should acknowledge respondent's love for them as their natural father, but the course of action recommended to achieve that result is dubious at best. When viewed from the children's point of view, the choice is between giving final security to the family unit of which these children are in every way an integral part or leaving them to wander upon a course of uncertainty in the hope that someday they will be able to accept and benefit from respondent's love. The past experience suggests, and respondent admitted that that hope is a slim one. Based on this record, a ruling favoring the adoption is warranted.

In light of the statutory mandate and the evidence presented it is the conclusion of the court that the adoption is in the best interests of the children and that respondent is withholding his consent contrary to said interests. (R. 207)

Accordingly, it is this 3rd day of August, 1978,

ORDERED that the petition for adoption herein, be, and hereby is, granted.

Paul R. Webber, III

J U D G E

Copies to: Hal Witt, Esq., 1620 Eye Street, N.W. Washington, D.C. 20006, Attorney for Petitioner

Edward L. Genn, Esq., 1341 G Street, N.W., Suite 610, Washington, D.C. 20005 Attorney for Respondent

(Officially reported as "Petition of J.O.L." in 409 A.2d 1073.)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 14014

IN THE MATTER OF:

The Petition of J.O.L. II
for the Adoption of Minor Children,

EUGENE JOHNSON III, APPELLANT.

Appeal from the Superior Court of the
District of Columbia

(Hon. Paul R. Webber III, Trial Judge)

(Argued September 21, 1979 Decided December 10, 1979)

Edward L. Genn for appellant.

Hal Witt, with whom *Janice S. Pohl* was on the brief, for appellee.

Before KELLY, FERREN and PRYOR, *Associate Judges*.

PRYOR, *Associate Judge*: Over the objection of appellant, the natural father of two children, the trial court granted a petition for the children's adoption by the stepfather. Appellant appeals, asserting that (1) the "best interests of the child" standard of D.C. Child*Code 1973, § 16-304(e) is substantively and procedurally unconstitutional as applied to a natural parent; and that (2) the

*(sic)

trial court erred in concluding there was clear and convincing evidence in the record to reach a conclusion that adoption by appellee is in the best interests of the children. After reviewing the case, we do not find that the court's judgment is erroneous or without evidence to support it, *Petition of Douglas*, D.C.App., 390 A.2d 1, 3 (1978), therefore, we affirm. (409 A.2d 1074)

Appellant and the children's mother were married in 1961. The couple had two children, the adoptees, one on October 28, 1964, the other on January 27, 1967. The parents separated in 1967, and were divorced on June 28, 1968. Custody of the children was awarded to the mother and by agreement, appellant was obliged to make monthly child support payments.

On April 25, 1969, the mother and appellee were married and began living together with the adoptees. In October 1972, a child was born to the couple. The three children, appellee and his wife presently live together as a family unit.

Appellant is a forty-year-old experimental psychologist. After his divorce from the adoptees' mother in 1968, he visited his children regularly until 1970.[1] As a consequence of a continuing dispute between appellant and the children regarding visitation, appellant stopped visiting the children. Attempts were made to resolve the problem, but the parties could not reach agreement. Thereafter, appellant brought an action in court and was subsequently granted visitation privileges. While this matter was pending in court, appellant attempted on several occasions to visit his children but encountered con-

[1] This period of visitation was interrupted briefly when, in August 1969, appellant was hospitalized for approximately twelve days for mental illness. Thereafter, in September 1969, appellant began visiting the children again.

siderable resistance from them. Recognizing that his visits were upsetting the children, appellant decided to stop visiting them until they were mature enough to understand the situation.

In March of 1977, having had no communication from appellant since October 1972, the children's mother received a phone call from appellant requesting a photograph of the children. This prompted consultation with a child psychiatrist. Not long afterwards, this action was instituted.

The trial court conducted an extensive hearing on the petition for adoption. The court heard from the children (*in camera*), the natural parents, and the stepfather. Witnesses testified about the interaction of the children with the appellee and their relationship with their natural father. A child psychiatrist stated his views as to the mental health of the children.

The court found that both of the adoptees viewed appellee as their "real father" and that he had become the psychological parent of the children. There was evidence that the children were under extreme emotional stress as the result of being legally obligated to visit with their natural father, but not desiring to do so. There was some question as to the appellant's mental health and his illegal use of drugs.

Acknowledging that the appellant at no time abandoned his children or otherwise abused them, the trial judge nevertheless concluded that the father's consent to their adoption by appellee was being withheld contrary to the children's best interests.

I.

We are concerned with a statute which, in pertinent part, reads as follows:

> The court may grant a petition for adoption without any [consent from natural parent(s)] . . . when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child. [D.C. Code 1973, § 16-304(3).]

We previously upheld the constitutionality of this statute in *In the Matter of Petition for Adoption of J.S.R.*, D.C. App., 374 A.2d 860 (1977). Appellant attempts to distinguish the facts in this case by arguing that in *J.S.R.*, *supra*, this court ruled on the facial constitutionality of the statute. In this instance, appellant requests that we rule on the constitutionality of the statute as applied to a natural parent. While we recognize that this distinction can properly be drawn in interpreting some statutes, we find that in this instance the argument is, in large measure, circular in nature. To argue that the adoption of a child without the consent of a natural parent, pursuant to a statutory standard of "best interests of the child," is defective constitutionally is to return to the issues raised and discussed in *J.S.R.*, *supra*. (1075)

In *J.S.R.*, *supra*, as in the instant case, it was the natural parent who questioned the constitutionality of § 16-304(e). While the appellant in that case did not specifically challenge the statute as applied to a natural parent, in reaching our conclusion that § 16-304(e) was not unconstitutionally vague, we noted, with approval, that the "best interest of the child" standard has been applied "in custody disputes between parents, and between parent and nonparent [as well as] . . . in child neglect cases . . . ." *J.S.R.*, *supra* at 863 (footnotes omitted). We see no reason to deviate from this standard in cases where natural parents challenge the adoption of their child by a stepparent, even where there is no show-

ing of abandonment and custody is not an issue in the case. The underlying objective is the same and that is to arrive at an arrangement that will be in the best interest of the child. This arrangement may require that the court (1) leave circumstances as it finds them, (2) change the custody of the child, or (3) grant a petition for adoption. The arrangement will be that which the trier of the fact finds to be in the best interest of the child.

We have previously recognized [2] that there is no precise formula for determining what is best for the child. Circumstances, foreseeable and unforeseeable, will vary across a wide spectrum. Experience has shown that it would probably be unwise to attempt to fashion a standard which would likely be more specific but also less flexible. In *J.S.R.*, *supra* at 863, we said:

> To say that such standard lacks precise meaning is not to say that it is without content and bounds . . . We think it is plain that the standard "best interest of the child" requires the judge, recognizing human frailty and man's

---

[2] In *Bazemore v. Davis*, D.C. App., 394 A.2d 1377, 1383 (1978), this court stated that:

> A norm is ill-suited for determining the future of a unique being whose adjustment is vital to the welfare of future generations . . . [I]t is not asking too much to demand that a court, in making a determination as to the best interest of a child, make the determination upon specific evidence relating to that child alone . . . magic formulas have no place in decisions designed to salvage human values . . . [T]he trial court shall decide the delicate question of what is the child's best interests solely by reference to the facts of the particular case . . . .

See also: *In re N.M.S.*, D.C. App., 347 A.2d 924 (1975); *Coles v. Coles*, D.C. App., 204 A.2d 330 (1964).

> limitations with respect to forecasting the future course of human events, to make an informed and rational judgment . . .

The cumulative lesson of this approach is that it cannot operate with pinpoint precision but, more importantly, does allow the trial judge to evaluate the persons involved and the choices available. In this instance the trial judge applied the statute by considering at least the following factors: (1) questions of family stability, (2) present and future effects of adoption or non-adoption on the child, (3) interaction between the child and the contestants, (4) who the child perceives as his or her psychological parent, (5) the child's adjustment to his or her living situation, school, and community, and (6) mental and physical health of all interested parties.

Accordingly, we find no merit to the contention that the statute was unconstitutionally applied.

II.

As an additional ground for reversal, appellant urges that the trial court erred in concluding there was clear and convincing evidence in the record from which it could reach a conclusion that the adoption by appellee is in the best interest of the children.

During the course of a three-day hearing on the petition for adoption, the trial court heard from all interested parties, observed the demeanor of the witnesses and interviewed the adoptees in his chambers. The court found that the adoptees live in the home of their natural mother and stepfather both of whom assume an active role in the supervision and development of the children. The natural mother and stepfather love and care for the children as they do the child of their marriage.

*409 A.2d 1076

In reaching the conclusion that adoption was in the best interest of the children, the trial court noted:

> Respondent for five years failed to exercise his right to visit. A failure he stated was based on his own concern because he recognized the emotional disturbance that his visits created [sic]. Nevertheless, he argues that he should be allowed to retain this right, in light of all the other benefits it would deny the children, so he may force the children from the "sheltered cocoon" in which they exist and into the real world to acknowledge him as their father. There is merit in the contention that these children should acknowledge respondent's love for them as their natural father, but the course of action recommended to achieve that result is dubious at best. When viewed from the children's point of view, the choice is between giving final security to the family unit of which these children are in every way an integral part or leaving them to wander upon a course of uncertainty in the hope that someday they will be able to accept the benefit from respondent's love. The past experience suggests, and respondent admitted that that hope is a slim one. Based on this record, a ruling favoring the adoption is warranted. [Mem. Opinion and Order at 12.]

We are satisfied from a review of the record that the court's judgment is not erroneous or without evidence to support it.

Affirmed.

District of Columbia
Court of Appeals

No. 14014

IN THE MATTER OF:

The Petition of J.O.L. II for the Adoption of Minor Children,

EUGENE JOHNSON III, Appellant.

BEFORE: Newman, Chief Judge; *Kelly, Kern, Gallagher, Nebeker, Harris, Mack, *Ferren, and *Pryor, Associate Judges.

O R D E R

On consideration of appellant's petition for rehearing en banc or for rehearing, it is

ORDERED by the merits division that appellant's petition for rehearing is denied; and it appearing that a majority of the judges of this Court has voted to deny appellant's petition for rehearing en banc, it is

FURTHER ORDERED that the aforesaid en banc petition is denied.

PER CURIAM

Copies to: Honorable Paul R. Webber
Clerk, Superior Court
Edward L. Genn, Esquire
Hal Witt, Esquire
Janice S. Pohl, Esquire

*denotes merits division.
Associate Judges Gallagher and Mack would grant appellant's petition for rehearing en banc.

CONSTITUTION OF THE UNITED STATES

AMENDMENT I--FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT V

"No person shall be...deprived of life, liberty, or property, without due process of law...."

AMENDMENT IX

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

DISTRICT OF COLUMBIA CODE

TITLE 16

CHAPTER 3

ADOPTION

§16-304. Consent

(a) A petition for adoption may not be granted by the court unless there is filed with the petition a written statement of consent, as provided by this section, signed and acknowledged before an officer authorized by law to take acknowledgments, before a representative of a licensed child-placing agency, or before the Mayor of the District, or unless a relinquishment of parental rights with respect to the prospective adoptee has been recorded and filed as provided by section 32-786.

(b) Consent to a proposed adoption of a person under eighteen years of age is necessary:

(1) from the prospective adoptee, if he is fourteen years of age or over; and also,

(2) in accordance with the provisions of any one of the following paragraphs:

(A) from both parents, if they are both alive; or

(B) from the living parent of the prospective adoptee, if one of the parents is dead; or

(C) from the court-appointed guardian of the prospective adoptee; or

(D) from a licensed child-placing agency or the Mayor in case the parental rights of the parent or parents have been terminated by a court of competent jurisdiction or by a release of parental rights to the Mayor or licensed child-placing agency, based upon consents obtained in accordance with paragraphs (A) through (C) of this subdivision, and

the prospective adoptee has been lawfully placed under the care and custody of the agency or the Board; or

(E) from the Mayor in any situation not otherwise provided for by this subsection.

(c) Minority of a natural parent is not a bar to that parent's consent to adoption.

(d) When a parent whose consent is hereinbefore required, after such notice as the court directs, cannot be located, or has abandoned the prospective adoptee and voluntarily failed to contribute to his support for a period of at least six months next preceding the date of the filing of the petition, the consent of that parent is not required.

(e) The court may grant a petition for adoption without any of the consents specified in this section when the court finds, after a hearing, that the consent or consents are withheld contrary to the best interests of the child.

(f) A person over eighteen years of age may be adopted, on the petition of the adopting parent or parents and with the consent of the prospective adoptee, if the court is satisfied that the adoption should be granted. As amended July 29, 1970, Pub.L. 91-358, Title I, § 145(a)(2), 84 Stat. 555; Oct. 22, 1970, Pub.L. 91-488, 84 Stat. 1086; July 22, 1976, D.C.Law, No. 1-75, § 5(e), 23 D.C.Reg. No. 6, p. 1177; Oct. 1, 1976, D.C.Law, No. 1-87, § 12, 23 D.C.Reg. No. 6, p. 1134.